

Knox v St. Luke's Hosp.
2013 NY Slip Op 30178(U)
January 11, 2013
Supreme Court, New York County
Docket Number: 800165/2010
Judge: Lucy Billings
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

Index Number : 800165/2010
KNOX, HERMAN
vs.
ST. LUKE'S HOSPITAL
SEQUENCE NUMBER : 002
EXTEND TIME

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for extend time

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court grants plaintiff's motion to extend his time to serve defendant Overfuss to the extent set forth pursuant to the accompanying decision. C.P.L.R. §§ 2004, 2005.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JAN 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/11/13

Lucy Billings, J.S.C.
LUCY BILLINGS

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x

HERMAN KNOX,

Index No. 800165/2010

Plaintiff

- against -

DECISION AND ORDER

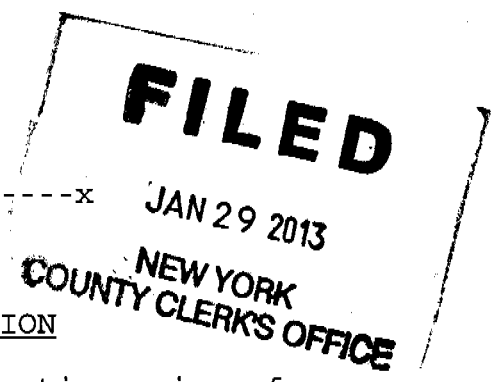
ST. LUKE'S HOSPITAL and
RONALD DREIFUSS M.D.,

Defendants

-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND OF THE CURRENT MOTION



This action for medical malpractice arises from a procedure to remove a hemodialysis catheter from plaintiff's chest performed by defendant Ronald Dreifuss M.D. at defendant hospital on March 6, 2008, after which plaintiff experienced continuing chest pain and discomfort. Only on April 27, 2010, when a cuff from the catheter was removed from plaintiff's chest, did plaintiff discover that the physician who originally removed the catheter had left a piece lodged in the chest, triggering the one year statute of limitations from discovery of the claimed malpractice. C.P.L.R. § 214-a. Plaintiff commenced this action against defendant hospital November 19, 2010, well within the limitations period. Because of an ensuing failure to obtain the hospital records, however, plaintiff did not learn until March 15, 2011, that Dr. Dreifuss performed the original removal procedure. When plaintiff served his motion to join Dr. Dreifuss as a defendant March 29, 2011, and filed the motion April 5,

2011, attaching a proposed supplemental summons and amended complaint against defendant Dreifuss, plaintiff was still within the one year limitations period.

On December 20, 2012, this court's order granting plaintiff's unopposed motion to join Ronald Dreifuss M.D. was entered. On February 28, 2012, that order was served with notice of entry, requiring service of the supplemental summons and amended complaint on defendant Dreifuss within 30 days, by March 29, 2012. Plaintiff now moves to extend his time to serve defendant Dreifuss until May 2, 2012, when the affidavit of service on him April 25, 2012, was filed. C.P.L.R. §§ 308(2), 2004. In support of the motion, plaintiff does not explain why he served Dr. Dreifuss late, but in reply he attributes the delay to his attorney's office move March 12, 2012, and his file remaining packed for several days in preparation for the move and in its aftermath. C.P.L.R. §§ 2004, 2005. While ordinarily a motion to extend time must include this essential element initially, Schultz v. Gershman, 68 A.D.3d 426 (1st Dep't 2009); Jain v. New York City Tr. Auth., 27 A.D.3d 273 (1st Dep't 2006); McNair v. Lee, 24 A.D.3d 159, 160 (1st Dep't 2005); Morris v. Solow Mgt. Corp., 8 A.D.3d 126, 127 (1st Dep't 2004), it was directly responsive to defendants' opposition, and defendants were permitted to respond further but declined to do so. Held v. Kaufman, 91 N.Y.2d 425, 430 (1998); Home Ins. Co. v. Leprino Foods Co., 7 A.D.3d 471 (1st Dep't 2004); NYCTL 1996-1 Trust v. Railroad Maintenance Corp., 266 A.D.2d 39, 40 (1st Dep't 1999);

Perilla v. Akanda, 14 Misc. 3d 555, 558 (Sup. Ct. Bronx Co. 2006). See Feliciano v. New York City Health & Hosps. Corp., 62 A.D.3d 537, 538 (1st Dep't 2009); Gaud v. Markham, 307 A.D.2d 845, 846 (1st Dep't 2003); Polir Constr. v. Etingin, 297 A.D.2d 509, 511 (1st Dep't 2002).

When plaintiff filed his motion to join Dr. Dreifuss with the proposed supplemental summons and amended complaint April 5, 2011, still within the limitations period, he tolled the statute of limitations, even though Dr. Dreifuss did not receive the supplemental summons and amended complaint against him until more than another year later. Perez v. Paramount Communications, 92 N.Y.2d 749, 755 (1999); Long v. Sowande, 27 A.D.3d 247, 248 (1st Dep't 2006). At that point 22 days, from April 5, 2011, until April 27, 2011, remained for plaintiff to serve Dr. Dreifuss.

That toll ended, however, upon entry of the order granting plaintiff permission to join Dr. Dreifuss as a defendant, Perez v. Paramount Communications, 92 N.Y.2d at 756; Long v. Sowande, 27 A.D.3d at 248. See, e.g., Hickman v. Motor Veh. Acc. Indem. corp., 75 N.Y.2d 975, 977 (1990); Ambrus v. City of New York, 87 A.D.3d 341, 342, 344-45 (2d Dep't 2011). Once the order was entered, the commencement of plaintiff's action against defendant Dreifuss was again entirely within plaintiff's control and no longer in the court's control. Ambrus v. City of New York, 87 A.D.3d at 346, 350. At that point, on December 20, 2011, the original 22 days, from April 5, 2011, until April 27, 2011, remained for plaintiff to serve Dr. Dreifuss by January 11, 2012.

Therefore, even had plaintiff served defendant Dreifuss within the time required by the court's prior order, by March 29, 2012, rather than 27 days later, on April 25, 2012, he would have received the summons and complaint well beyond the limitations period.

II. DEFENDANT DREIFUSS' POSITION

Defendant Dreifuss, now opposing plaintiff's motion to extend his time for service, does not claim prejudice as a result of plaintiff's delay between March 29, 2012, and April 25, 2012. Although Dr. Dreifuss further faults plaintiff for waiting until June 27, 2012, to serve this motion to extend time, plaintiff explains that he waited until Dr. Dreifuss responded to the amended complaint, and Dr. Dreifuss does not claim prejudice from this further delay either.

Defendant Dreifuss' prejudice, if any, derives from receiving service of the action against him months after the statute of limitations expired, even after affording plaintiff the toll between March 29, 2011, and December 20, 2011. Perez v. Paramount Communications, 92 N.Y.2d at 755; Long v. Sowande, 27 A.D.3d at 248. The service and the filing April 5, 2011, of plaintiff's motion to join Dr. Dreifuss with the proposed pleadings provided public notice as well as notice to defendant hospital of plaintiff's action against Dr. Dreifuss. Perez v. Paramount Communications, 92 N.Y.2d at 755. Yet he did not necessarily receive notice of such a motion until he received the product of that motion, the supplemental summons and amended

complaint against him, on April 25, 2012, almost another year after the original expiration of the statute of limitations April 27, 2011.

Nevertheless, even though the toll provided plaintiff an advantage without consideration of the potential prejudice to the newly joined defendant, plaintiff still missed the extended expiration of the statute of limitations. An extension of his time to serve Dr. Dreifuss does not concomitantly extend the toll. Therefore the statute of limitations defense remains available to defendant Dreifuss regardless of plaintiff's delay between March 29, 2012, and April 25, 2012, in serving Dr. Dreifuss; regardless of plaintiff's delay until June 27, 2012, in serving his motion to extend time; and regardless whether the court grants his motion.

III. EXTENDING PLAINTIFF'S TIME TO SERVE DEFENDANT DREIFUSS

While denial of the extension would extinguish plaintiff's claims against defendant Dreifuss in this action outright, granting the extension permits plaintiff to avoid the consequences of his untimely action if he demonstrates entitlement to application of the relation back doctrine. This doctrine would allow his claims against defendant Dreifuss to relate back to when plaintiff filed his claims against the original defendant hospital. C.P.L.R. § 203(b); Buran v. Cural, 87 N.Y.2d 173, 178 (1995); Cintron v. Lynn, 306 A.D.2d 118, 119 (1st Dep't 2003); Jessamy v. Parkmed Assoc., 306 A.D.2d 34 (1st Dep't 2003); Cruz v. Vinicio, 259 A.D.2d 294, 295 (1st Dep't

1999). The "linchpin" of the doctrine is notice to the new defendant within the limitations period. Buran v. Cural, 87 N.Y.2d at 180; Cintron v. Lynn, 306 A.D.2d at 120. An extension of the time for service, which does not extend the toll, so that defendant Dreifuss retains the statute of limitations defense, strikes a balance that permits Dr. Dreifuss to show any prejudice from not receiving notice of the action against him until after the statute of limitations expired. The toll would have denied him this opportunity, had plaintiff served him promptly after entry December 20, 2011, of the court's order. See Smith v. Mousa, 305 A.D.2d 313, 314 (1st Dep't 2003)

Once defendant Dreifuss has established that plaintiff's claims against the new defendant are time barred, plaintiff bears the burden to demonstrate that the relation back doctrine applies. Raymond v. Melohn Props., Inc., 47 A.D.3d 504, 505 (1st Dep't 2008); Anderson v. Montefiore Med. Ctr., 41 A.D.3d 105, 107 (1st Dep't 2007); Cintron v. Lynn, 306 A.D.2d at 119. While it appears obvious from the current record that plaintiff's claims against Dr. Dreifuss are time barred, defendant has not yet moved to dismiss the complaint, triggering plaintiff's burden to demonstrate application of the relation back doctrine and allowing the development of a record adequate to determine whether the doctrine applies. Its inapplicability does not appear so obvious from the current record, however, as to dictate deny the extension of time due to the absence of a potentially meritorious claim. Tejeda v. Woodycrest Realty, L.L.C., 57

A.D.3d 338, 340 (1st Dep't 2008); Cacciatore v. City of New York, 49 A.D.3d 271 (1st Dep't 2008); Dokmecian v. ABN AMRO N. Am., 304 A.D.2d 445 (1st Dep't 2003); Polir Constr. v. Etingin, 297 A.D.2d at 512. When plaintiff served his original complaint, defendant hospital received notice that plaintiff was complaining about the catheter removal, a procedure undoubtedly performed by a physician. Hence the hospital would be expected to have investigated the complaint, reviewed the hospital records of the removal procedure, learned who performed it, and communicated with that physician. See Buran v. Cural, 87 N.Y.2d at 180; Donovan v. All-Weld Prods. Corp., 34 A.D.3d 257, 258 (1st Dep't 2006); Long v. Sowande, 27 A.D.3d at 249; Cintron v. Lynn, 306 A.D.2d at 120.

Whether these expected steps occurred, whether the hospital and physician are sufficiently united in interest, and whether plaintiff satisfies all the requirements for the relation back doctrine to apply, however, are not ripe for determination in the context of the current motion and absent a motion by defendant Dreifuss to dismiss the complaint against him. See Raymond v. Melohn Props., Inc., 47 A.D.3d at 505; Anderson v. Montefiore Med. Ctr., 41 A.D.3d at 107; Long v. Sowande, 27 A.D.3d at 249; Cintron v. Lynn, 306 A.D.2d at 119-20. Although it further appears obvious, from plaintiff's unawareness of who performed the removal, that plaintiff did not ask for Dr. Dreifuss, the current record does not disclose, for example, whether or how long the hospital employed Dr. Dreifuss, whether it would be

vicariously liable for his negligence on this or another basis, and whether the two defendants share defenses. Donovan v. All-Weld Prods. Corp., 34 A.D.3d 257; Cintron v. Lynn, 306 A.D.2d at 120; Jessamy v. Parkmed Assoc., 306 A.D.2d 34; Mercer v. 203 E. 72nd St. Corp., 300 A.D.2d 105, 106 (1st Dep't 2002).

IV. CONCLUSION

Given plaintiff's uncontroverted excuse for his non-willful delay of 27 days, the potential relation back and hence merit to his claims against defendant Dreifuss, and the absence of any claimed prejudice from this discrete delay, the court grants plaintiff's motion to extend his time to serve defendant Dreifuss until May 2, 2012. C.P.L.R. §§ 2004, 2005; Tejeda v. Woodycrest Realty, L.L.C., 57 A.D.3d at 340; Cacciatore v. City of New York, 49 A.D.3d 271; Alleyne v. Penske Truck Leasing Corp., 12 A.D.3d 174, 175 (1st Dep't 2004); Smith v. Mousa, 305 A.D.2d at 313-14. This disposition, however, is without prejudice to a motion to dismiss or for summary judgment dismissing the complaint against defendant Dreifuss based on the statute of limitations. C.P.L.R. §§ 3211(a)(5), 3212(b). The statute of limitations was tolled as of April 5, 2011, but only until December 20, 2011, and did not extend after January 11, 2011. This decision constitutes the court's order.

FILED

JAN 29 2013

DATED: January 11, 2013

NEW YORK COUNTY CLERK'S OFFICE *Lucy Billings*

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.